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Docket No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term, 1988

FREDERICK J. WOLSKE,
Petitioner

Versus

STATE OF WISCONSIN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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QUESTIONS PRESENTED

I. Did the trial court err in denying defendant's motion to dismiss counts one and four due to the unconstitutional shift of the burden of proof of an element as required by the underlying statute?

II. Do sections 940.09(1)b and 940.25(1)b, Wisconsin Statutes, work an unconstitutional denial of due process by providing enhanced penalties for behavior which was not illegal at the time of the accident?

III. Do the constitutional limits on prosecutional discretion prohibit charging under both sections 940.09 and 940.08, Wisconsin Statutes, as those provisions are interpreted by the Wisconsin Supreme Court?

LIST OF PARTIES

The parties to the proceedings below were Petitioner, FREDERICK J. WOLSKE and Respondent, the STATE OF WISCONSIN, the same parties as are before this Court.

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IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1988

FREDERICK J. WOLSKE, *Petitioner*

v.

STATE OF WISCONSIN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The Petitioner, FREDERICK J. WOLSKE, respectfully prays that a Writ of Certiorari issued to review the Judgment and Opinion of the Supreme Court of Wisconsin, entered in the above-entitled proceeding on March 15, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals, District II, State of Wisconsin has not been reported. The contents thereof is included in the Appendix hereto, Page No. A1-A19. The Order denying the Petition for Review by the Supreme Court of Wisconsin has not been reported. The contents thereof is included in the Appendix hereto, Page No. A-20.

JURISDICTION

Invoking state jurisdiction under 28 U.S.C. 1257(3), the Petitioner brought this suit in the Court of Appeals, State of Wisconsin, District II. On January 20, 1988, the Court of Appeals denied the Petitioner's appeal of an order entered by the Circuit Court of Waukesha County.

On March 15, 1988, the final judgment of the Supreme Court of Wisconsin was entered denying this Petitioner's Petition for Review in that court.

Justice Stevens ordered that the time for filing this Writ of Certiorari be extended to and including June 13, 1988.

The Jurisdiction of this court to review the Judgment of the District Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

940.245 INJURY BY NEGLIGENT USE OF A VEHICLE. (1) Whoever causes great bodily harm to another by a high degree of negligence in the operation or handling of a vehicle is guilty of a Class E felony.
(2) A high degree of negligence is conduct which demonstrates ordinary negligence to high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another.

940.25 INJURY BY INTOXICATED USE OF A VEHICLE. (1) Any person who does either of the following under par. (a) or (b) is guilty of a Class E felony:

(a) Causes great bodily harm to another human being by the operation of a vehicle while under the invluence of an intoxicant.

(b) Causes great bodily harm to another human being by the operation of a vehicle while the person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more alcohol in 210 liters of that person's breath.

940.08 HOMICIDE BY NEGLIGENT USE OF VEHICLE OR WEAPON. (1) Whoever causes the death of another human being by a high degree of negligence in the operation or

handling of a vehicle, firearm, airgun, knife or bow and arrow is guilty of a Class D felony.

(2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another.

940.09 HOMICIDE BY INTOXICATED USER OF VEHICLE OR FIREARM. (1) Any person who does either of the following under par. (a) or (b) is guilty of a Class D felony.

(a) Causes the death of another by the operation or handling of a vehicle, firearm or airgun and while under the influence of an intoxicant;

(b) Causes the death of another by the operation or handling of a vehicle, firearm or airgun while the person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath.

939.22 WORDS AND PHRASES DEFINED. In chs. 939 to 948, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction:

(44) "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air.

939.66 CONVICTION OF INCLUDED CRIME PERMITTED. Upon prosecution for a crime, the actor may be convicted of either the

crime charged or an included crime, but not both. An included crime may be any of the following:

(1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

885.235 CHEMICAL TESTS FOR INTOXICATION. (1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a blood alcohol concentration of 0.1% or more or 0.2% or more while operating or driving a motor vehicle, while operating a motorboat, except a sailboat operating under sail alone, or while handling a firearm, evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a blood alcohol concentration of 0.1% or more or 0.2% or more if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

(a) 1. Except as provided in subd. 2, the fact that the analysis shows that there was 0.05% or less by weight of alcohol in the person's blood or 0.05 grams of alcohol or less in 210 liters of the person's breath is prima facie evidence that the person was not under the influence of an intoxicant and did not have a blood alcohol concentration of 0.1% or more.

2. The fact that the analysis shows that there was more than 0.0% but less than 9.1% by weight of alcohol in the person's blood or more than 0.9 grams but less than 0.1 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance or any other drug but is not given any prima facie effect.

(b) The fact that the analysis shows that there was more than 0.05% but less than 0.1% by weight of alcohol in the person's blood or more than 0.05 grams but less than 0.1 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of intoxication or blood alcohol concentration of 0.1% or more but is not to be given any prima facie effect.

(c) The fact that the analysis shows that there was 0.1% or more by weight of alcohol in the person's blood or 0.1 grams or more of alcohol in 210 liters of the person's breath is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had a blood alcohol concentration of 0.1% or more.

(d) The fact that the analysis shows that there was 0.15% or less by weight of alcohol in the person's blood or 0.15 grams of alcohol or less in 210 liters of the person's breath is prima facie evidence that the person did not have a blood alcohol concentration of 0.2% or more.

(c) The fact that the analysis shows that there was more than 0.15% but less than 0.2% by weight of alcohol in the person's blood or more than 0.15 grams but less than

0.2 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of blood alcohol concentration of 0.2% or more but is not to be given any prima facie effect.

(f) The fact that the analysis shows that there was 0.2% or more by weight of alcohol in the person's blood or 0.2 grams or more of alcohol in 210 liters of the person's breath is prima facie evidence that he or she had a blood alcohol concentration of 0.2% or more.

(1m) In any action under s. 346.63 (2m), evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she had a blood alcohol concentration in the range specified in s. 346.63 (2m) if the sample was taken within 3 hours after the event to be proved. The fact that the analysis shows that there was more than 0.0% but not more than 0.1% by weight of alcohol in the person's blood or more than 0.0 grams but not more than 0.1 grams of alcohol in 210 liters of the person's breath is prima facie evidence that the person had a blood alcohol concentration in the range specified in s. 346.63 (2m).

(2) The concentration of alcohol in the blood shall be taken prima facie to be three-fourths of the concentration of alcohol in the urine.

(3) If the sample of breath, blood or urine was not taken within 3 hours after the event to proved, evidence of the amount of alcohol

in the person's blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony.

(4) The provisions of this section relating to the admissibility of chemical tests for intoxication or blood alcohol concentration shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant or had any particular blood alcohol concentration or blood alcohol concentration within any particular range.

(5) In this section:

(a) "Blood alcohol concentration of 0.1% or more" means a blood alcohol concentration of 0.1% or more by weight of alcohol in a person's blood or 0.1 grams or more of alcohol in 210 liters of a person's breath.

(am) "Blood alcohol concentration of 0.2% or more" means a blood alcohol concentration of 0.2% or more by weight of alcohol in a person's blood or 0.2 grams or more of alcohol in 210 liters of a person's breath.

(b) "Controlled substance" has the meaning specified in s. 161.01 (4).

(c) "Drug" has the meaning specified in s. 450.01 (10).

30.681 INTOXICATED BOATING (1) OPERATION.

(b) Operating with alcohol concentrations at or above specified levels. No person may engage in the operation of a motorboat while the person has a blood alcohol concentration of 0.1% or more by weight of alcohol in

his or her blood. No person may engage in the operation of a motorboat while the person has 0.1 grams or more of alcohol in 210 liters of his or her breath.

346.63 OPERATING UNDER INFLUENCE OF INTOXICANT OR OTHER DRUG. (1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(b) The person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath.

(c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30 (1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

(1m) No person may drive or operate a

motor vehicle while the person has a blood alcohol concentration of 0.2% or more weight of alcohol in that person's blood or 0.2 grams or more of alcohol in 210 liters of that person's breath.

(2) (a) It is unlawful for any person to cause injury to another person by the operation of a vehicle while:

1. Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

2. The person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath.

3. A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of subd. 1 or 2 or both for acts arising out of the same incident or occurrence. If the person is charged with violating both subds. 1 and 2 in the complaint, the crimes shall be joined under s.971.12. If the person is found guilty of both subds. 1 and 2 for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30 (1q) and 343.305. Subdivisions 1 and 2 each require proof of a fact for conviction which the other does not require.

(b) Under par. (a), the actor has a defense if it appears by a preponderance of the evidence that the injury would have occurred even if the actor had not been under the influence of an intoxicant or a controlled substance or a combination thereof, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined indluence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or did not have a blood alcohol concentration described under par. (a) 2.

(2m) If a person has not attained the age of 19, the person may not drive or operate a motor vehicle while he or she has a blood alcohol concentration of more than 0.0% but not more than 0.1% by weight of alcohol in the person's blood or more than 0.0 grams but not more than 0.1 grams of alcohol in 210 liters of that person's breath. The only penalty for violation of this subsection is suspension of a person's operating privilege under s. 343.30 (1p). Notwithstanding s. 343.10(1), for the first offense under this subsection, the person is eligible for an occupational license under s. 343.10 (1) at any time. If a person arrested for a violation of this subsection refuses to take a test under s. 343.305, the refusal is a separate violation and the person is subject to revocation of the person's operating privilege under s. 343.305 (9) (em).

(3) In this section:

(a) "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

(b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

(4) If a person is convicted under sub. (1) or a local ordinance in conformity therewith, or sub. (2), the court shall proceed under s. 343.30 (1q).

STATEMENT OF THE CASE

On or about May 25, 1986, the defendant and several friends met at the Audmar Tavern at about midnight. Among these individuals were FRED WOLSKE, MARK KOSOBUCKI, WILLIAM LETTO, and JAN REINHOLZ. After the tavern closed, these four individuals were joined by STEVE OSCHMAN, and the five decided to go for a boat ride. REINHOLZ, LETTO, and KOSOBUCKI went in the latter's boat; STEVE OSCHMAN went for a ride in a boat operated by FRED WOLSKE. At about 1:15 a.m. they arrived at Rep's Dam Tavern on the Southside of Big Muskego Lake. They all left Rep's at approximately 2:00 a.m. and were all riding the same boats in which they had come. They traveled back across the lake and into Bass Bay. They allowed the two boats to drift side by side while the individuals visited with one another. After it was determined that they were coming too close to the shore, they decided it was time to move the boats back into the middle of the lake. A short time later, there was a collision in which Mr. LETTO and Ms. REINHOLZ were injured. Mr. LETTO died due to his injuries received in the accident.

The defendant was charged in a multiple count complaint: See Appendix pg. A21-A27. This complaint was filed on July 14, 1986. On August 4, 1986, defendant requested a preliminary hearing and the State filed an amended complaint. The defendant was released on a signature bond and brought motions to dismiss the complaint as amended. Defendant argued that Section 940.09(1)(a) and (b) as well as Section 940.25(1)(a) and (b) were unconstitutional.

Defendant also argued that the complaint did not allege facts to support a finding of probable cause of the violation of 940.08(1) or a finding that defendant was intoxicated at the time of the accident. Finally, defendant argued that Count 3 and 6 of the complaint were multiplicious.

Briefs were filed by both parties regarding these motions. Oral arguments with respect to the motions were heard on November 26, 1986, January 30, 1987, February 6, 1987, and February 11, 1987. On February 11, 1987, the court granted defendant's motion to dismiss the complaint in it's entirety with prejudice on the questions of duplicity, multiplicity and confusion of the jury, but denied defendant's motion to dismiss as to the other grounds raised in the motions first heard November 26, 1986. The prosecution appealed the dismissal of the complaint; defendant cross-appealed the denial of the motion on other grounds in the Circuit Court.

Invoking state jurisdiction under 28 U.S.C. 1257(3), the defendant brought this suit in the Court of Appeals, State of Wisconsin, District II. On January 20, 1988, the Court of Appeals from an order of the Circuit Court for Waukesha County affirmed in part, reversed in part and cause remanded.

On March 15, 1988, the final judgment of the Supreme Court of Wisconsin was entered denying this Petitioner's Petition in that court.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS COUNTS ONE AND FOUR ON THE GROUNDS THAT THE UNDERLYING STATUTES UNCONSTITUTIONALLY SHIFT THE BURDEN OF PROOF OF AN ELEMENT OF THE CRIME TO DEFENDANT.

Operating a vehicle in the highways or waterways of Wisconsin is not illegal. However, the Wisconsin legislature has wisely prohibited such operation while under the influence of an intoxicant. The legislature has also provided for increased penalties if another person is injured or killed as a result of someone's intoxicated operation of a vehicle. In 1981, the Wisconsin legislature erred when it shifted the burden of showing causation to the defendant for a violation of Section 940.09(1)(a). The Wisconsin legislature similarly erred in the drafting of Section 940.25(1)(a). Furthermore, the Wisconsin Supreme Court has errantly supported this constitutional breach despite the fact that such a decision flies in the face of clear, well established and overriding United States Supreme Court decisions to the contrary. State v. Caibaoisai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

Causation is essential to tie a defendant to the crime of having killed or injured another while engaged in a prohibited activity (e.g., felony murder). That the harm occurred at about the same time as the prohibited act is not enough to show causation. In Section 940.03, the harm, that is the death, must occurred by reason of and as a part of the prohibited act. See Boyer v. State, 91 Wis.2d 647; 284 N.W.2d 30 (1979).

Our Wisconsin Supreme Court has discussed constitutionally acceptable language and other contacts for the same issue has arisen. State, ex. rel. Schulter v. Roraff, 39 Wis.2d 342 159 N.S.2d 25 (1968). In Schulter, the court found the language of Section 947.15 to be acceptable. The Section provides enhanced penalties for death resulting from contributing to a delinquency of a minor. The language of Section 947.15 is such that it requires the death to be a consequence of, that is caused by, the crime or prohibited activity.

When compared to the acceptable statutory language discussed in Boyer and Schulter, it becomes clear that there is a problem with Sections 940.09(1)(a) and 940.25(1)(a). Both of these sections imply a mandatory

rebuttable presumption that the illegal conduct, the intoxicated condition of the person while operating the vehicle, causes the death or injury of the victim.Any argument that causation is not an element of these offenses, that there is no such implicit presumption, it is believed by the fact that the burden as to causation pops up in both sections as an affirmative defense.

It is true, states may require a defendant to carry the initial burden of proving an affirmative defense provided for by statute (e.g., a self defense). Nevertheless, when such a presumption involves an element of the crime, the shift of the burden to the defendant is a breach of defendant's constitutional right to due process. Muller v. State, 94 Wis.2d 450, 289 N.W.2d 570 (1980).

Sections 940.09(1)(a) and 940.25(1)(a) find the defendant presumptively guilty of the respective crimes of homicide and injury by intoxicated operation of a vehicle. It is an unedifying game of semantics and contrary to common sense to say that it is not implicit in the Statutes that an intoxicated operation is comehow the cause of the harm. In fact, Section 940.09 used to require proof of causation explicity. Now, the State does not need to show evidence of a causal relationship unless the defendant raises a preponderence of evidence to rebut the presumption of causation. But this does not mean that causation is not an element of the crime. It is an element, but one that is allowed to be presumed by the State. The affirmative defense does not remedy the burden of proof shift of such a key element to the defendant. Patterson v. New York 432 U.S. 197 (1977).

> "It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." Patterson at Page 210.

In the Patterson case, the United States Supreme Court discussed New York's murder statute and the affirmative defense of "heat of passion". The court pointed out that such a defense may not shift the burden of proof of an element of the crime to the defendant. An affirmative

defense may only require the defendant to present a preponderence of evidence to place an issue mitigating circumstances.

> "The death, intent to kill, and causation are facts that the state is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred." Patterson at Page 210.

To shift the burden of proof to the defendant of an element of the crime violates the defendant's right to due process. In In Re Winship, 397 U.S. 358 at Page 364 (1970). In Winship, the court held that the prosecution bears the burden of proving all of the elements of a crime beyond a reasonable doubt all the way through the trial. The Winship court held that the reduction of the State's burden of proof on an element to a mere preponderence violated defendant's right to due process. The United States Supreme Court has under the Winship rule found a complete shift of an element of the crime wholly unacceptable. Mullaney v. Wilbur, 421 U.S. 684 (1974).

> "If Winship were limited to those elements that constitute a crime as defined by State law, a State could undermine many of the interest that decision sought to protect without effecting any substanted change in it's law."

All the State would need to do is redefine elements constituting a crime, characterizing them as factors bearing on the extent of punishment. Winship, as is clear from the Mullaney decision, was concerned with substantive matters, not formalism. Given that ours is a jury system, a conviction must be one arrived at beyond a reasonable doubt as to all elements substantively speaking. Semantic formalism will not suffice. Our system can only be morally effective if the burden of proof is placed squarely on the shoulders of the State.

Wisconsin, in the actions of the legislature and in the poorly reasoned acquiescence of it's Supreme Court in Caibaoisai, has done exactly the sort of semantic shuffling of the deck that the Mullaney, Patterson and Winship decisions prohibit. Sections 940.09(1)(a) and 940.25(1)(a) are drafted in a way that unconstitutinally shifts the burden of proof of causation to the defendant. To say that the element of causation has been removed is ridiculous. What the statutory change allows, for the purposes of the State's prima face case, is that the element of causation under each of these statutes may be presumed or inferred. For example, even the jury instruction based on 940.09(1)(a) states that "death need not be shown to be caused by the drinking of alcohol. . ." (emphasis added) (Wisconsin Jury Instructions CR1885). The wrongdoing need not be shown by proof to have caused the death or injury; it may be presumed.

The Wisconsin Supreme Court has essentially tried to justify this presumption by saying that what the legislature means is that operating while intoxicated is negligence per se. This is a non sequitur; even in negligence per se cases causation must be proved. As to any other homicide, causation must be proved. Homicide or injury by negligent operation requires proof of causation. By taking an element of the crime and allowing the State to presume it as opposed to prove it would take the burden as to the link between the alledgedly wrongful conduct and the harm and place it on the defendant to disprove it.

Proving something beyond a reasonable doubt is a heavy burden in many cases; proof of causation may not be easy in some fact situations under Section 940.09. Proof of a negative does not excuse this burden either.

> "We discern no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proof of a fact so critical to criminal culpability." Mullaney, Supra.

Causation is part of the Plaintiff's burden even in civil cases involving injury or wrongful death. Here, where far more is at stake than pecuninary damages, to-wit: defendant's liberty, the legislature and court have no right to excuse the State from proof of an element so critical to establishing in the condition of such a serious offense. That the State must show the harm was caused by defendant's wrongful conduct, not mere coincidence or caused by an intervening factor or wrongdoing of another, may be a heavy burden, but it is one which our system deems a far allocation.

Therefore, it is abundantly clear that Section 940.09(1)(a) and Section 940.25(1)(a) unconstitutionally shift the burden of proof of a crucial element of each of these offenses to the defendant, requiring the defendant to establish his innocence.

II. SECTION 940.09(1)(b) AND SECTION 940.25(1)(b) ARE UNCONSTITUTIONAL IN THAT THEY PROVIDE AN ENHANCED PENALTY FOR BEHAVIOR WHICH WAS NOT ILLEGAL AT THE TIME OF THE ACCIDENT.

There is no justification for the enhanced penalties imposed by Sections 940.09(1)(b) and 940.25(1)(b). While it is true that death and injury are serious matters, this does not relieve the State of providing that the underlying conduct which brought about the death is in fact against the law.

Under Wisconsin law, operating a boat with a blood alcohol level of .10 or greater was not against the law at the time this accident occurred. This accident occurred on May 26, 1986. The .10 requirement of Section 30.681(1)(b) was created by 1985 Wis. Act 331 which was not enacted until June 4, 1986. There is no provision any where in the law that this was retroactive. The State at the trial court level assumed that Section 346.63 is the underlying statute that has been violated. However, Chapter 346 does not govern boats, but over the road vehicles. (See Section

346.02.) The State may try to use Section 939.22(44) to bring in the definition of boats as motor vehicles. However, this definition is not applicable to vehicles governed under Chapter 346. Section 939.22 provides that the definitions apply only to chapters 939 through 948.

While at the time of the accident there was a statute namely, Section 30.68(1)(b) that made it illegal to operate a boat while under the influence of an intoxicant, there was no corresponding violation for operating a boat with a blood alcohol content greater than .10 in effect at the time of this accident.

On the date of the offense, the .10 law, section 885.235, Wisconsin Statutes, did not apply to boats. 885.235 only applied to use of vehicles on the highway and use of firearms. It wasn't until June 12, 1986 that the .10 law applied to motorboats. It was not a crime to operate with a B.A.C. in excess of .10 and there is no statutory presumption of intoxication involved in this case.

Therefore, there is no underlying criminal activity or prohibited wrong to justify providing an enhanced penalty because death or injury has occurred as a result of the activity. Therefore, it is clear that Sections 940.09(1)(b) and 940.25(1)(b) are unconstitutionally defective because the result is a denial of the defendant's right to due process.

III. THERE ARE CONSTITUTIONAL AND STATUTORY LIMITATIONS ON A PROSECUTOR'S CHARGING AUTHORITY THAT PREVENT CHARGING UNDER BOTH SECTIONS 940.09 AND 940.08 AS THE STATUTES ARE CURRENTLY INTERPRETED BY THE WISCONSIN SUPREME COURT.

The State's complaint is plainly multiplicious as to several of the counts. In the leading case, the United States Supreme Court plainly set forth the test for multiplicity in criminal complaints as between separate counts.

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory pro-

visions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." U.S. v. Blockburger, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

The reasoning behind disallowing multiplicious pleading in a criminal complaint is that the defendant is not to be punished twice for the same offense in violation of his Sixth Amendment rights against double jeopardy. For the defendant to be convicted and sentenced on two counts which basically punish the same offense or two provisions, one of which is a lesser included offense of the other, violates his rights under the double jeapordy clause. Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 2227, 53 L.Ed. 187, (1977). One statutory provision is a lesser included offense of the other if proving the greater involves proving the lesser. U.S. v. Jefferson, 714 F.2d 689 (7th Cir. 1983).

For example, counterfeiting only requires the proof of the involvement of one person who actually has counterfeited currency; this may be joined by conspiracy to commit a crime against the United States since the latter does not require proof of counterfeiting but does require at least two persons. U.S. v. Gabriel, 525 F.Sup. 173 (7th Cir. 1980). Under the Blockburger test, the court in Gabriel found the situation not to be multiplicious.

Similarly, a person who allegedly took revenues from the person or presence of two persons left in charge of a restaurant and as part of the same transaction took another restaurant employee's personal effects, may be charged with two separate counts of armed robbery. State v. Mosley, 102 Wis.2d 636, 307 N.W.2d 200 (1981).

In this case, the complaint is multiplicious as to Count 3. If the prosecution can prove that the defendant violated Section 940.09, then they have necessarily shown a violation of 940.08. This is so because if the prosecution can prove the operation of the vehicle while intoxicated, then according to the Wisconsin Supreme Court they have

shown negligence per se. Caibaoisai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). The court in Caibaoisai reasoned that the legislature obviously found this to be highly risky and negligent behavior enough to specifically prohibit it. Id Page 595.

Given this case, there is no additional fact to be proved with respect to Section 940.08. Even though on it's face, 940.08, may appear to require an additional element of causation, upon closer inspection this is not so. It is true that the State must show that the negligent behavior caused the harm under Section 940.08. However, upon it's face, Caibaoisai allows the State to presume the facts of causation as an element of that crime unless rebutted by the defendant. See Section 940.09(1)(a) and (b) and (2). Thus, there is not any fact necessary to prove Section 940.08 that is not necessary to prove a violation of Section 940.09. Therefore, under the Blockburger test, count three is clearly multiplicious.

Similarly, count 6 of the complaint is multiplicious. This is because, again, the Caibaoisai holding that to operate while intoxicated, with a blood alcohol content over .10, is negligence per se. There is, again, no additional fact that must be proven for each provision that does not have to be proven with respect to the other, in this case Sec. 940.25 and 940.245. While it is true there are other ways to negligently operate a vehicle, Section 940.08 and Section 940.245 become lesser included violations because the Caibaoisai decision holds that proof of operation while intoxicated is highly negligent behavior; it is always negligent to so operate a vehicle, so much so that the court found it to be negligence per se. Again, although Section 940.245 and Section 940.08 both require causation, under the reasoning of the Caibaoisai case under Section 940.25, causation may be presumed. The relevant language of 940.09 and 940.25 is identical on this point except as to the result. Thus, both count three and six of the complaint are multiplicious under the Blockburger test in that proof of the greater offenses also alleged in other counts

of the complaint results in proof of the latter. U.S. vs. Jefferson, supra. The trial court in this case expressed a concern regarding a multiplicious pleading in addition to multiplicity in the traditional sense. Please see (3 pages of court testimony--pages 109-111). The court was concerned with the fact that the case involved one act, one set of facts, the same victims, time, and place. The Wisconsin Supreme Court distinguished between a single event as opposed to a series of acts when discussing miltiplicious pleading. Harrell v. State, 88 Wis.2d 546, 277 N.W.2d 462 (1978). The court focused on several dispositive aids in that case when it determined the issue of multiplicity as to a sexual assault:

> "(
> 1) Nature of the act;
> (2) Time;
> (3) Place;
> (4) Intent;
> (5) Cumulative punishment;
> (6) Muscular contraction; and
> (7) Number of victims.
>
> The presence and absence of a single factor or combination of factors other than the nature of the act is not conclusive as the issue."

The court also warned against a rigid application of the identical evidence or additional fact test in determining double jeopardy application. The court pointed out that this test is determinative of double jeopardy application only if there is total identity. If the analysis results in exposing some evidentiary differences, a court would need to look at the situation on a case by case basis to weigh the difference and determine whether it is a material difference or whether it is too minor for purposes of overcoming the double jeopardy prohibition. The court said:

"Deference to the legislative authority to define crimes and prescribe punishment for them must be balanced with the constitutional prescription against double jeopardy and cruel and unusual punishment."

It is abundantly clear in this case that we are talking about one act, not a series of events. We are also talking about an event that took place at a given time in a given place. Intent is not an element in either of the crimes so focusing on that criteria is unnecessary. As to cumulative punishment nowhere does the Legislature specifically indicate an intent that a defendant in Mr. Wolske's position received multiple punishment for what was essentially one alleged act.

As to the number of victims with respect to 940.08 and 940.09, and again with respect to 940.25 and 940.245, the exact same victim is involved and only one alleged act brought about the alleged harm to each of those respective victims. By finding operation of a vehicle while intoxicated to be negligence per se, and by condoning the legislative action allowing a mandatory rebuttable presumption as to the element of causation, the Supreme Court of Wisconsin has created a situation where, as to substantive elements, not just as to individual evidentiary situations, 940.08 can become a lesser included offense of 940.09 because proof of the greater, operating while intoxicated, results in proof of the other, 940.08. The same result occurs with 940.25 and 940.245. U.S. v. Jefferson, supra. State v. Caibaoisai, 122 Wis.2d 587 at p. 595, 363 N.W.2d 574 (1985). Thus, the statutory scheme as interpreted by the Supreme Court of Wisconsin winds up preventing multiple prosecutions under Section 939.66(1).

Largely due to hurried political maneuvering to "get tough" on drunk drivers, without taking the time to carefully reason through and provide a consistent statutory scheme, the statutory problem that the trial court so ably recognized and which Petitioner illustrates, is a unique one. This case involves one continuous activity in the circumstances surrounding the collision that occurred on May 26, 1986.

The State has argued in the lower courts that the statutes in question involve completely different legislative intent. It is a useless semantic distinction for State to argue that Section 940.09, Section 940.25, Section

940.08, and Section 940.245 do not share essentially the same legislative intent. It is clear that protecting the public from unsafe operation of a vehicle is the paramount concern behind all of these statutory sections. Prohibiting negligent operation and intoxicated operation which has been held to be negligence per se in Caibaoisai, furthers this goal in the opinion of the Legislature. No rational basis exists for prohibiting intoxicated operation if you divorce it from the rationale that to do so is unsafe, grossly negligent, and impairing of safe operation.

In State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 466 (1983) it is clear that two statutes may not be employed to exact multiple punishment upon a defendant.

> "Whether there is a single act, transaction, incident, or course of conduct; whether the two grounds are significantly different so that they may be viewed as deserving separate punishment; and whether the two grounds invade a different interest of the victim of the public which the statute intends to protect..."

are the criteria the Supreme Court was concerned with in Bohacheff, 114 Wis.2d at p. 416. As the Petitioner points out in his statement of facts, and furthermore as it is evident, at least for purposes of argument in the allegations in the complaint, what is involved here is one continuous act leading up to the resulting collision, and subsequently the death and injury of Mr. Letto and Ms. Reinholz respectively.

In addition the legislative intent behind all of these statutory sections is clear: preventing unsafe operation of vehicles, thereby ensuring the safety of the remainder of the public. Finally, under the interpretation provided by the Supreme Court in State v. Caibaoisai, supra, it is abundantly clear that these two grounds are not so significantly different as to purpose and intent that they deserve separate punishment. To do so would in fact subject defendant to multiple punishments for what was essentially one allegedly wrong act.

It becomes clear that if a legislature intends multiple punishment as between two statutes, they must specifically state that multiple punishment is available for those two offenses. State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983) citing Missouri v. Hunter, 459 U.S. 359 (1983). In the Gordon case, the court said that the State must specifically provide that multiple punishment is available for felony murder and murder to both be charged. Felony murder and kidnapping were not exempt from the prohibition against multiple punishment under Section 939.71, unless the Legislature explicitly provided a clear indication of such exemption from the overriding principle preventing multiple punishment of one act. Gordon at page 569.

In Gordon, the Wisconsin Supreme Court was follow ing the U.S. Supreme Court decision in Missouri v. Hunter, supra, which did involve a lesser included offense. Nevertheless, the Supreme Court in Hunter said the defendant could not be subjected to the trial and hazards of the trial and the resulting multiple punishments unless the statute specifically allowed for multiple prosecution and punishment of a felony and the offense of committing a crime with arms, citing Burke v. U.S., 437 U.S. 1 at p. 11 (1978). The Missouri statute provided specifically that if a weapon was used in the commission of a crime, separate punishment could be had in addition to the punishment for whatever felony or crime for which defendant was also being prosecuted. The Missouri statute illustrates the highly specific language that the United States Supreme Court approves of in carving out an exception to the prohibition against multiple punishment as it comes under the Sixth Amendment of the Constitution. (See also Bohacheff, supra.)

Moreover, 940.25(1)(a) and (b) were held to be totally separate offenses. There was no specific legislative mandate of multiple punishments upon a conviction of both.

In Gordon, the court did not find 939.66 to provide a specific statutory exception to the overriding principle of

avoiding multiple punishment for one act. There is no specific statutory provision that says that separate punishment may be provided for Sections 940.09 and 940.08, and for 940.25 and for 940.245.

The prosecution has broad discretion in the charging decision, but there are constitutional limitations on that charging discretion. However, absent a specfic legislative intent to the contrary, multiple charging on a case like this is prohibited under the double jeopardy clause and United States v. Blockburger, 284 U.S. 299 (1972).

Just because the State need not put in evidence of causal negligence in the intoxicated statute cases does not mean there is not an implied element of causation, a mandatory rebuttable presumption. If the Legislature truly intended to make the causation issue completely irrelevant with respect to the intoxication statutes in question here, then they would not have provided an opportunity for the defendant to raise the issue of causation as an affirmative defense. To take any other position is to walk around wearing blinders. Essentially the Legislature is saying "to drive drunk is highly negligent in and of itself. It impairs judgment and provides a dangerous situation to others. Obviously, it causes any resulting injuries unless of course the defendant can show some other intervening cause." With Section 940.08 and Section 940.245 however, the State has the burden of providng causation and negligence with no benefit of any such presumptions. Thus this is not at all like any other ordinary affirmative defense situations.

Here, we have two conflicting burdens of proof on the same issue arising from exactly the same act and fact situation. Petitioner realizes this may be the result of badly drafted law and erroneous precedent, but it is easy to see the jury's confusion will not be resolved by a mere instruction.

The State's solution is to say "let's have separate trials!" This would be an atrocity in light of the Fifth

and Sixth Amendment. It would amount to multiple trials, multiple punishments from one allegedly criminal action, one incident, one collision. This is too great an overstepping of the Fifth and Sixth Amendments without any justification beyond sloppy prosecution and prosecutorial expediency. Let the prosecution honestly and responsibly assess the evidence they believe they have and charge accordingly; whether they have enough for evidence to convict under 940.09 or for 940.08. The interests of justice, defendant's constitutional rights, not to mention the waste of court time involved in hearing the same set of facts at least twice, revolt against any such suggestion.

Furthermore, the trial court properly dismissed the complaint in it's entirety out of concern for jury confusion as to the burden of proof on causation.

The apportionment of the burden of proof as to causation differs between Section 940.08 and 940.09. The trial court found that this was likely to confuse the jury and therefore dismissed the complaint in its entirety without prejudice so that the State could refile a complaint in keeping with the court's decision.

The State has the burden of proving all elements of a crime beyond a reasonable doubt. In Re Winship, 397 U.S. 358, (1970). This burden is on the State throughout the trial and may not be shifted to the defendant.

States may provide statutory affirmative defenses, however, these may not be designed so as to negate an element of the crime, because this results in an unconstitutional shift of the burden of proof as to an element of the crime to the defendant. An example of this sort of affirmative defense was discussed in Mullaney v. Wilbur, 421 U.S. 684, (1975). In that case, defendant was charged with first degree murder. According to the applicable State law, the jury was instructed that both murder and manslaughter were intentional killings without justification. First degree murder also contained as an element "malice aforthought". The jury was to find the defendant guilty of first degree murder unless he had established that there was no malice

aforethought, in which case they could then find him guilty of manslaughter. It was held that this affirmative defense unconstitutionally shifted the burden of proof as to an element of the crime of first degree murder to the defendant.

The U.S. Supreme Court also held such affirmative defenses unconstitutional in Patterson v. New York, 432 U.S. 197, (1977).

Employing the Mullaney and Patterson decisions, the Supreme Court of Wisconsin has found that instructions to the jury which are confusing as to the apportionment of the burden of proof with respect to an element of the crime violate the Mullaney and Patterson standards. State v. Schulz, 102 Wis.2d 423, 307 N.S.2d 151 (1981). In Schulz, the defendant was charged with third degree murder. Defendant's only defense was the statutory affirmative defense of intoxication. This defense attacks a key element of the crime, namely, intent. The court in Schulz made it very clear that this kind of statutory affirmative defense must be carefully handled by the rial court so as not to allow the burden of persuasion to inadvertently fall on defendant. In Schulz, the trial court instructed the jury that:

> "To be relieved of responsibility for his action, it is not enough for a defendant to establish that he was under the influence of intoxicating beverages. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisit to the commission of the crime charged. . . . You may consider this evidence along with all other evidence in this case in making your determination as to whether the defense of intoxication has been met. Schulz, 307 N.W.2d 151 at page 157.

The Wisconsin Supreme Court found this instruction improper and misleading since it could clearly confuse the jury as to who had the burden of persuasion with respect to the element of intent.

In this case, WOLSKE has been charged with a viola-

tion of Section 940.09. Under that Statute, he has an affirmative defense if he can show, by a proponderance of the evidence, some intervening cause of death such as would show that it would have occured regardless of Defendant's actions. It can be argued that the statutory affirmative defense gets around the Patterson decision because the fact-finder is allowed to presume causation between the intoxicated state while operating and the death of the victim. A similar argument can be made with respect to 940.25.

The focus here is the confusion the jury is sure to have since Defendant was also charged with 940.08 and 940.245. Generally, the State may charge defendant with a crime and its lesser included offense. With respect to 940.08 the State must show causal negligence. To turn a blind eye to the obvious confusion on the jury's part as to whom prove what on the element of causation would seriously jeopardize defendant's right to be proven guilty beyond a reasonable doubt. If the defendant produces evidence as to his affirmative defense of an intervening cause in the same trial where the State must show causation in order to obtain a conviction on 940.08, the jury might understandably weigh defendant's evidence, which must only meet a proponderance standard as to his affirmative defense for 940.09 against the Stat's evidence regarding homicide by gross negligence which must meet the reasonable doubt standard. It is easy to see how a jury could get confused. It is unlikely that the jury instruction can be appropriately tailored such that the jury can separate out and remain completely uninfluenced by the presentation of evidence on causation by each of the parties.

To sever the two counts and try defendant separately on each would result in the defendant being subjected to a complete trial and the hazards that go with it more than once for the same offense, something clearly prohibited by the Sixth Amendment.

Given this potential confusion and the overriding concern that a defendant receive a fair trial, a concern far more important than any inconvenience to the State, the trial court was correct in dismissing the complaint in its entirety without prejudice, and thereby requiring the State to file a new complaint with counts conforming to just those facts that the state honestly believes they can prove.

CONCLUSION

It is clear there is a multiplicity problem and potential jury confusion with respect to Section 940.08 in the Supreme Court's interpretation of Section 940.09, and similarly as between Sections 940.25 and Section 940.245. The State's bald ascertion of broad discretionary charging authority largely ignores and minimizes the constitutional limits on that. The State completely disregards the interest of a fair trial and the trial court's concerns regarding jury confusion in the mere interest of prosecutorial expediency. Therefore, this court should find that the trial court made the correct decision in dismissing the complaint in its entirety without prejudice, thus requiring the district attorney to file a new complaint in accordance with the fair and responsible exercise of his prosecutorial function.

The State of Wisconsin, in the actions of its Legislature and the acquiescence of its highest court, have committed a serious, long prohibited violation of due process. They have shifted to the defendant the purden of proof as to causation, a crucial element in establishing criminal culpability under Section 940.09(1)(a) and Section 940,.25(1)(a). The Legislature has also unconstitutionally enhanced penalties under Section 940.09(1)(b) and Section 940.25(1)(b) for activities not against the law at the time of this accident.

Based on all of the foregoing, it is proper and necessary for this court to grant the Petition for Review on the part of FREDERICK J. WOLSKE.

Respectfully submitted:

LAW FIRM OF DANIEL P. FAY, S.C.

/s/

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/s/

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Appendix:

I. Decision of Wisconsin Court of Appeals, District II.

II. Memorandum Decision of Wisconsin Supreme Court.

III. Original Complaint.

No. 87-0533-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plantiff-Appellant
and Cross-Respondent,

v.

FREDERICK J. WOLSKE,

Defendant-Respondent
and Cross-Appellant.

APPEAL and CROSS-APPEAL from an order of the circuit court for Waukesha County: HARRY G. SNYDER, Judge. Affirmed in part, reversed in part and cause remanded.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

BROWN, P.J. The major issue is whether a person may be charged, convicted and punished for both homicide by intoxicated operation of a motorboat and homicide by highly negligent operation arising out of the same incident. The trial court held that even though the intoxication and negligence charges were neither multiplicious, in the classic sense of the term, nor lesser included offenses, multiple punishment would be inappropriate. It thereupon dismissed the charges without prejudice. We agree with the state that the legislature intended to permit multiple prosecutions and punishments for these charges and that such intention is constitutional. We address other issues as well.

The facts are that defendant Frederick J. Wolske was operating a motorboat at an allegedly high rate of speed when it collided with another motorboat. The collision resulted in the death of one person and serious injury to another. Chemical tests indicated that Wolske's blood alcohol level was .224%.

The complaint charged three counts in relation to each victim. Regarding the deceased, Wolske was charged with (1) causing death by operating a boat while under the influence of an intoxicant contrary to sec. 940.09(1)(a), Stats.; (2) causing death by operating while having a blood alcohol concentration (BAC) of .10% or more contrary to sec. 940.09(1)(b); and (3) causing death by a high degree of negligence in operating a boat, contrary to sec. 940.08(1), Stats.

Regarding the seriously injured victim, the counts were similar except that great bodily harm was substituted for death as the gravamen for the counts, thereby implicating sec. 940.25(1)(a) and sec. 940.245(1), Stats. This case comes to us following the trial court's dismissal of all charges.

A defendant may be charged and convicted of multiple crimes arising out of one criminal act if the legislature intends it. Geitner v. State, 59 Wis.2d 128, 130-31, 207 N.W.2d 837, 839 (1973). See also sec. 939.65, Stats., and Missouri v. Hunter, 459 U.S. 359, 366-69 (1983).

A means of descerning legislative intent is the "additional element" test adopted in Blockburger v. United States, 284 U.S. 299, 304 (1932), and codified in Wisconsin at secs. 939.66 and 939.71, Stats. Simply stated, if each statutory crime requires proof of a fact for conviction which the other does not require, then it can be said that the legislature has promulgated separate, distinct offenses providing for multiple convictions and punishments. State v. Bohacheff, 114 Wis.2d 402, 411-12, 338 N.W.2d 466, 470-71 (1983).

A comparison of the elements of the statutes involved reveals that the negligence statutes, secs. 940.08 and 940.245, Stats., require the state to prove operation of a vehicle with a high degree of negligence, whereas the intoxication statutes, secs. 940.09 and 940.25, Stats., require the state to prove operation of a vehicle while under the influence of an intoxicant. See State v. Caibaiosai, 122 Wis.2d 587, 593, 363 N.W.2d 574, 577 (1985); Wis J I--Criminal 1170.

Wolske contends, however, that this difference is merely superficial, and that the statutes therefore fail to meet the additional element test of Blockburger. This is so, he argues, because if the state proves operation of a vehicle while intoxicated, then under Caibaiosai it has also shown negligence per se. Id. at 595, 363 N.W.2d at 578. Wolske therefore concludes that there is no additional fact which must be proven under the negligence statutes which is not satisfied by a showing of intoxicated operation under the intoxication statutes.

Wolske is correct in asserting that it is negligence per se to operate a vehicle while intoxicated. Id. However, Wolske's position ignores the different historical facts the state must prove for conviction under the separate statutes. A violation of the intoxication statutes requires proof of intoxication but does not require proof of erratic or negligent operation of a vehicle. Id. at 593, 600, 363 N.W.2d at 577, 581. Conversely, a violation of the negligence statutes requires proof of highly negligent operation of a vehicle, but does not require proof of intoxication. See secs. 940.08 and 940.245, Stats. Moreover, one can be intoxicated while operating a vehicle without doing so in a highly negligent manner and can be highly negligent in the operation of a vehicle without being intoxicated. Thus, the negligence and intoxication statutes require proof of distinct factual elements.

The distinction between the factual elements of the negligence and intoxication statutes becomes clearer when considering the issue of causation. Under the intoxication statutes, the state must prove a causal connection between a defendant's operation of a vehicle while intoxicated and the death or injury of the victim. See Caibaiosai at 594, 363 N.W.2d at 577. Negligence need not be shown as a causal element. See id. at 600, 363 N.W.2d at 581.

Under the negligence statutes, the state must prove a causal connection between the operation of a vehicle with a high degree of negligence and the victim's death. See secs. 940.08 and 940.245, Stats. Thus, as shown

through causation, the state is proving a fact under one statute--death or injury from intoxicated operation versus death or injury from highly negligent operation--that it is not proving under the other statute. This satisfies the Blockburger "additional elements" test.

In addition to examining whether the statutory language requires proof of additional elements, this court also looks to the nature of the proscribed conduct and the appropriateness of multiple punishments to determine whether the legislature intended multiple prosecutions and convictions. Bohacheff, 114 Wis.2d at 410, 338 N.W.2d at 470.

The conduct proscribed by the intoxication statutes is operating a vehicle while intoxicated and thereby causing death or great bodily harm. See Caibaiosai, 122 Wis.2d at 591, 363 N.W.2d at 576. The intoxication statutes' purposes is to "provide maximum safety for all users of the highways of this state" from the harm threatened by "[o]peration of motor vehicles by persons who are under the influence of an intoxicant." See id., citing Laws of 1981, ch. 20, secs. 2051(13)(a) 1 and 2051(13)(b)1.

The negligence statutes proscribe the conduct of operating a vehicle in a highly negligent manner, causing death or great bodily harm. See secs. 940.08 and 940.245, Stats. The apparent purpose of the negligence statutes is to provide maximum safety for highway users or, in this case, users of the waterways from the harm threatened by the operation of motor vehicles or boats in a highly negligent manner. See id.; see also Hart v. State, 75 Wis.2d 371, 379-84, 249 N.W.2d 810, 813-15 (1977).

Thus, the nature of the conduct proscribed by each statute protects a distinct interest of the victim and the public. Where the statutes intend to protect multiple and varied interests of the victim and the public, multiple punishments are appropriate. Bohacheff at 416, 338 N.W.2d at 473. Moreover, multiple punishments are appropriate where the grounds of punishment are different. Id. Here the grounds of punishment are significantly different. The

intoxication statutes are grounded on the principle that persons should be punished for operation of a vehicle while intoxicated because it creates "a risk that will not be tolerated." Caibaiosai at 595, 363 N.W.2d at 578. The negligence statutes are grounded on the principle that persons should be punished for operation of a vehicle in a highly negligent manner creating unreasonable risk and high probability of death or harm to another. See Hart, 75 Wis.2d at 382, 249 N.W.2d at 814.

The different conduct proscribed and different grounds for the negligence and intoxication statutes along with their distinct factual elements convince us that multiple prosecutions, convictions and punishments were intended by the legislature. We therefore agree with the state's appeal and conclude that the multiple charges in the complaint were properly brought. We reverse the trial court's order dismissing the complaint on multiplicity grounds.

Wolske also contends that the trial court properly dismissed the complaint on grounds of potential jury confusion. The court determined that confusion would result from the different standards of proof on the element of causation under the negligence and intoxication statutes. To escape liability on the intoxication charges, a defendant bears the burden of proving that the death or injury would have resulted even had he not been intoxicated. Secs. 940.09(2) and 940.25(2), Stats. As to the negligence charges, however, the state has the burden of proving beyond a reasonable doubt that the defendant's high degree of negligence caused the death or injury. Secs. 940.08 and 940.245, Stats.

While we understand the trial court's concern over jury confusion, we conclude that the trial court abused its discretion in ordering dismissal of the complaint as the remedy to potential confusion. Section 971.12(3), Stats., provides that where there is potential for prejudice to a defendant, the court may order separate trials for each count. The less drastic remedy of severance would serve the pur-

pose of preventing jury confusion, see Butala v. State, 71 Wis.2d 569, 579-80, 239 N.W.2d 32, 37 (1976), while at the same time preserving the state's right to pursue all charges which it is legally authorized to bring. Therefore, we remand to the trial court for consideration of severance under sec. 971.12(3) as a remedy for potential jury confusion.

Wolske argues in his cross-appeal that the trial court erred in denying his motion to dismiss the charges under secs. 940.09(1)(a), Stats., on grounds that the statutes are unconstitutional. Wolske contends that the statutes impermissibly shift the burden of causation to the defendant for a violation of secs. 940.09(1)(a) and 940.25(1)(a).

A similar challenge was rejected by our supreme court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.,W.2d 574; see also State v. Kennedy, 134 Wis.2d 308, 315, 396 N.W.2d 765, 767 (Ct. App. 1986). The supreme court's decision is binding on this court, and therefore we hold the questioned statutes constitutional. Id.

Wolske also argues that secs. 940.09(1)(b) and 940.25(1)(b), Stats., causing death or injury by operation of a vehicle with a BAC of .10% or more, are unconstitutional because they provide an enhanced penalty for conduct which was not against the law at the time of his boating accident. Operating a boat with a BAC of .10% or greater was not then illegal.

The task of defining criminal conduct is entirely within the legislative domain, State v. Baldwin, 101 Wis. 2d 441, 447, 304 N.W.2d 742, 746 (1981), and, within constitutional limitations, the legislature possesses the inherent power to prohibit and punish any act as a crime. See Clausen v. Clerk of Circuit Court, 537 F. Supp. 1233, 1236 (E.D. Wis. 1982); see also 22 C.J.S. Criminal Law S 13 (1961).

Here, through secs. 940.09(1)(b) and 940.25(1)(b), Stats., the legislature has squarely proscribed causing death or injury by operation of a vehicle while the operator has a BAC of .10% or more. These are not "enhanced penalty" statutes without a lesser offense counterpart. Rather, the

statutes represent the considered decisions of the legislature to prohibit certain conduct. Because the conduct prohibited is clearly set forth in the statutory language, warning Wolske and all others of the forbidden conduct, we conclude that the statutes are constitutional. See State v. Muehlenberg, 118 Wis.2d 502, 509, 347 N.W.2d 914, 917 (Ct. Ap. 1984).

Wolske next challenges the sufficiency of the complaint on several grounds, arguing that the complaint was insufficient to show probable cause. A complaint must set forth facts that would lead a reasonable person to conclude that a crime had probably been committed and that the defendant named in the complaint was probably the culpable party. State v. Stoehr, 134 Wis.2d 66, 74, 396 N.W.2d 177, 179 (1986). Adequacy of the complaint is tested in a commonsense, and not hypertechnical, evaluation of the essential facts establishing probable cause. Id.

Wolske's contention is that the complaint fails to show probable cause that he operated his boat in a way that shows "ordinary negligence to a high degree" resulting in death or great bodily harm contrary to secs. 940.08 and 940.245, Stats. In support of the negligence charges, the complaint indicates that the collision occurred at approximately 3:00 a.m., after an afternoon and evening during which the defendant had been consuming alcohol. At the time of the collision, Wolske was operating his boat at approximately 40 miles per hour while doing "tail stands" in which the operator "guns" the motor of the boat to force the front end out of the water.

The complaint further states that Wolske's boat struck the other boat at a high rate of speed and without giving warning or taking evasive action even though Wolske knew that the other boat would possibly be stopped in the area where the collision occurred. Wolske and the operator of the other boat had just agreed to meet in that part of the lake. The collision occurred even though the other boat was parked with its "running lights and interior lights and the radio on" four to five minutes prior to the collision.

These allegations are sufficient to lead a reasonable person to conclude that Wolske probably committed the crime of causing death or great bodily harm by operation of his boat with a high degree of negligence. A magistrate could conclude that operating a boat at 40 miles per hour, at night, while doing tail stands in an area where another boat is expected to be is negligent conduct creating a high probability of death or great bodily harm. See State v. Cooper, 117 Wis.2d 30, 38, 344 N.W.2d 194, 198 (Ct. App. 1984). Every driver knows or should know that the greater the speed, the greater the impact, and the greater the probabilities of death or great bodily injury.[1] Id.

Wolske also contends that the complaint fails to show probable cause to believe that he was intoxicated at the time of the accident. In support of intoxication, the complaint indicates that Wolske engaged in consumption of alcohol from approximately 3:00 p.m. the afternoon preceding the accident until approximately 2:00 a.m. the morning of the accident. An officer investigating the accident noted that following the collision there was a strong odor of intoxicants on Wolske's breath, that Wolske's eyes were bloodshot and that his speech was slurred. Upon escorting Wolske to a telephone, the officer noticed that Wolske weaved as he walked and lost his balance. The officer then asked Wolske to perform a field sobriety test, and as the officer and Wolske walked outside to perform the test, Wolske lost his balance and had to sidestep to catch himself. Wolske then refused to perform any field

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[1]Wolske states that there is nothing illegal or improper in operating a boat in the manner he did (presumably referring to the speed and tail stands) and concludes that he was therefore not negligent in any way. However, the legality or illegality of the actions is irrelevant. State v. Cooper, 117 Wis.2d 30, 38, 344 N.W.2d 194, 198 (Ct. App. 1984).

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sobriety tests. A blood alcohol test was performed on Wolske indicating a BAC of .224%.[2]

These allegations in the complaint strongly support a finding of probable cause to believe that Wolske was intoxicated at the time of the accident. A fair-minded magistrate could reasonably conclude that the facts alleged justify further criminal proceedings and that the charges are not merely capricious. Lofton v. State, 83 Wis.2d 472, 478, 266 N.W.2d 576, 578 (1978).

Wolske's final challenge to the compaint is on grounds that the citizen witnesses who provided information used in the complaint are unreliable. One witness, Mark Kosobucki, was the driver of the boat which Wolske collided with. The other is Mark's wife, Francine Kosobucki. Wolske contends that Mark and Francine are unreliable because they have an interest in shifting blame away from Mark as driver of the second boat and towards Wolske.

Wolske relies on State v. Marshall, 92 Wis.2d 101, 284 N.W.2d 592 (1979), to argue that in determining probable cause when the credibility of witnesses is challenged the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 114 (1964), should be used. The Aguilar test requires a complaint to establish (1) the underlying circumstances which show reason to believe the information is credible, and (2) the underlying circumstances which show that the manner in which the informant reached his conclusions was reliable. Marshall at 114, 284 N.W.2d at 597. Wolske contends that the complaint fails to show probable cause under this test, while the state argues that it does.

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[2]Wolske argues that much of the information provided in the complaint is unusable in showing probable cause, including the blood test results. He contends that the complaint fails to state sufficient detail concerning the basis of its allegations. We disagree. A complaint need only assert essential facts, not all evidentiary facts, which clearly indicate what the defendant is alleged to have done. State v. Williamson, 109 Wis.2d 83, 87, 325 N.W.2d 360, 363 (Ct. App. 1982), rev'd on other grounds, 113 Wis.2d 389, 335 N.W.2d 814 (1983), cert. denied, 464 U.S. 1018 (1983).

However, in Illinois v. Gates, 462 U.S. 213 (1983), the United States Supreme Court abandoned the two-pronged test established in Aguilar. In its place the Court held that in determining probable cause the "totality of the circumstances" should be considered. Id. at 238. The Court reasoned that a totality of the circumstances analysis was more consistent with the idea of probable cause being a "practical, nontechnical" evaluation than was the rigid two-pronged Aguilar test. Id. at 230-31.

The Gates totality test has been adopted in Wisconsin in various contexts as applicable to "situations involving the traditional probable cause determination." See, e.g., State v. Boggess, 115 Wis.2d 443, 453-54, 340 N.W.2d 516, 523 (1983). We therefore conclude that it is applicable here, in assessing probable cause based on the credibility of citizen witnesses, replacing the Aguilar two-pronged test as used in Marshall.

Under the Gates test, the value of information provided by an informant or citizen witness is measured by the totality of the circumstances. Gates at 230. The magistrate who assesses probable cause must make a practical, commonsense decision whether under all the circumstances provided in the complaint, including veracity and the basis of knowledge of persons who provide information, there is a fair probability that a crime has been committed and the defendant committed it. Cf. id. at 238. In determining the overall reliability of witnesses, the totality of the circumstances analysis allows a deficiency in indicia demonstrating a witness' veracity to be compensated for by a strong showing concerning the witness' basis of knowledge or by some other indicia of reliability. Id. at 233. A reviewing court must ensure only that the magistrate had a substantial basis for its determination. id. at 238-39.

Here, the complaint clearly identifies Mark and Francine Kosobucki, indicating that they are believed to be truthful and reliable. There is also a strong showing of Mark and Francine's basis of knowledge. Mark and Francine each reported information gained by direct personal obser-

vation of the events which occurred. Mark was with Wolske throughout the day and present on the boat Wolske collided into; Francine viewed the accident scene from a pier at the edge of the lake. There is also present sufficient detail in the information provided by Mark and Francine to indicate reliability, with the complaint indicating step by step how they each made their observations and what they observed. See Boggess, 115 Wis.2d at 455-56, 340 N.W.2d at 523-4. We conclude, therefore, that under the totality of circumstances there are sufficient indicia of reliability in the Kosobuckis for a determination of probable cause.

By the Court.--Order affirmed in part, reversed in part and cause remanded.

Recommended for publication in the official reports.

Order of the
SUPREME COURT
STATE OF WISCONSIN

No. 87-0533-CR State v. Wolske T.C. #86CF0372

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-respondent and cross-appellant-petitioner Frederick J. Wolske, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

STATE OF WISCONSIN : CRIMINAL-TRAFFIC DIVISION CIRCUIT COURT : WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

CRIMINAL COMPLAINT

FREDERICK J. WOLSKE
S82 W15940 Bass Bay Lane
Muskego, Wisconsin
DOB: 8/17/60

Defendant.

Sgt. James Budish, City of Muskego Police Department, being first duly sworn, on oath, upon information and belief, says that:

COUNT #1

On May 26, 1986 during the early morning hours on Bass Bay in the City of Muskego, Waukesha County, Wisconsin, the defendant did cause the death of another, to-wit: William G. Letto, by the operation or handling of a vehicle, to-wit: a motorboat, a self-propelled device for moving persons and operated on water as defined in Section 939.22 (44), Wisconsin Statutes, and while under the influence of an intoxicant, contrary to Section 940.09 (1) (a), Wisconsin Statutes.

And further advising the Court that the above alleged offense is defined as a "Class D" felony; and upon conviction of the above alleged offense, the above named defendant is subject to a monetary fine of not more than $10,000, or imprisonment of not more than five years, or both.

COUNT #2

On May 26, 1986 during the early morning hours on Bass Bay in the City of Muskego, Waukesha County, Wisconsin, the defendant did cause the death of another,

to-wit: William G. Letto, by the operation or handling of a vehicle, to-wit: a motorboat, a self-propelled device for moving persons and operated on water as defined in Section 939.22 (44), Wisconsin Statutes, while the defendant had a blood alcohol concentration of 0.1% or more by weight of alcohol in the defendant's blood, contrary to Section 940.09 (1) (b), Wisconsin Statutes.

And further advising the Court that the above alleged offense is defined as a "Class D" felony; and upon conviction of the above alleged offense, the above named defendant is subject to a monetary fine of not more than $10,000 or imprisonment of not more than five years, or both.

COUNT #3

On May 26, 1986 during the early morning hours on Bass Bay in the City of Muskego, Waukesha County, Wisconsin, the defendant did cause the death of another, to-wit: William G. Letto, by a high degree of negligence in the operation or handling of a vehicle, to-wit: a motorboat, a self-propelled device for moving persons and operated on water as defined in Section 939.22 (44), Wisconsin Statutes, contrary to Section 940.08 (1), Wisconsin Statutes.

And further advising the Court that the above alleged offense is defined as a "Class D" felony; and upon conviction of the above alleged offense, the above named defendant is subject to a monetary fine of not more than $10,000, or imprisonment of not more than five years, or both.

COUNT #4

On May 26, 1986 during the early morning hours on Bass Bay in the City of Muskego, Waukesha County, Wisconsin, the defendant did cause great bodily harm to another, to-wit: Jane S. Reinholz, by the operation of a vehicle, to-wit: a motorboat, a self-propelled device for moving persons and operated on water as defined in Section 939.22 (44), Wisconsin Statutes, while under the influence of an intoxicant, contrary to Section 940.25 (1) (a), Wiscon-

sin Statutes.

And further advising the Court that the above alleged offense is defined as a "Class E" felony; and upon conviction of the above alleged offense, the above named defendant is subject to a monetary fine of not more than $10,000, or imprisonment of not more than two years, or both.

COUNT #5

On May 26, 1986 during the early morning hours on Bass Bay in the City of Muskego, Waukesha County, Wisconsin, the defendant did cause great bodily harm to another human being, to-wit: Jane S. Reinholz, by the operation or handling of a vehicle, to-wit: a motorboat, a self-propelled device for moving persons and operated on water as defined in Section 939.22 (44), Wisconsin Statutes, while the defendant had a blood alcohol concentration of 0.1% or more by weight of alcohol in the defendant's blood, contrary to Section 940.25 (1)(b), Wisconsin Statutes.

And further advising the court that the above alleged offense is defined as a "Class E" felony; and upon conviction of the above alleged offense, the above named defendant is subject to a monetary fine of not more than $10,000, or imprisonment of not more than two years, or both.

COUNT #6

On May 26, 1986 during the early morning hours on Bass Bay in the City of Muskego, Waukesha County, Wisconsin, the defendant did cause great bodily harm to another, to-wit: Jane S. Reinholz, by a high degree of negligence in the operation or handling of a vehicle, to-wit: a motorboat, a self-propelled device for moving persons and operated on water as defined in Section 939.22 (44), Wisconsin Statutes.

And further advising the Court that the above alleged offense is defined as a "Class E" felony: and upon conviction of the above alleged offense, the above named defendant is subject to a monetary fine of not more than

$10,000, or imprisonment of not more than two years, or both.

And prays the defendant be dealt with according to law; that the basis of said complaint is complainant's own personal investigation and review of the reports and records of Investigator James Larsen, Patrolman Craig Moser and Patrolman John Walejewski, all of the City of Muskego Police Department and all of whom which your complainant has worked with in the past and knows to be truthful and reliable. With respect to Counts 1 through 6 of the complaint, the reports of Patrolman Craig Moser indicate that on May 26, 1986 at approximately 3:26 a.m., he responded to a report of a boating accident on Bass Bay near the Aud-Mar Tavern located at W156 S7901 Ladwig Drive, all in the City of Muskego, Waukesha County, Wisconsin, and upon his arrival was met my male subject later identified as one Mark L. Kosobucki, who in this instance is believed to be truthful and reliable, and who adv.sed Officer Moser that he had been involved in a boating accident shortly before the arrival of the officer and that two people that who were in his boat were seriously injured and still inside the boat. Moser indicates he then proceeded to the north shore of Bass Bay where he observed a white Sylvan deck boat registered to the above mentioned Kosobucki to be floating approximately ten feet off shore. Moser indicates that he could observe that there was very extensive damage to the right front hole area and also to the steering console in the center of the boat which was completely knocked over at which time he then waded out to the boat along with several members of the Tess Corners Rescue Squad and fellow Officer Sgt. Warhanek where he than observed two unconscious subjects to be lying in the boat, one female later identified as Jane S. Reinholz and one male later identified as one William G. Letto. Moser indicates at that point both subjects were then removed from the boat and transported to New Berlin Memorial Hospital. Moser next

indicates again speaking to the above mentioned Mark Kosobucki, who advised him that the two individuals who had been injured had been passengers on his boat and that while sitting in the middle of Bass Bay in his boat, just floating and listening to music on the radio and talking, the boat was run over by another boat driven by an individual known by Mark Kosobucki to be the above named defendant, Fred Wolske. Mark Kosobucki further advised that he had been with the aforementioned defendant from approximately 2:00 p,.m. on May 25, 1986, during which time he had helped the defendant put his boat lift in at the defendant's residence on Bass Bay. Kosobucki indicates that upon completing same at approximately 3:00 p.m. on May 25, 1986, they went then to Kosobucki's residence and started playing horseshoes whereas Kosobucki believes Wolske consumed four or five beers and that the two along with a large group of other persons sat around drinking at Kosobucki's residence until approximately 7:00 o'clock p.m. at which time they then decided to go to Jan and Rich Reinke's cottage located off Mystic Drive on Big Muskego Lake to "grill out." Kosobucki states that everyone travelled to that location utilizing a boat. Kosobucki next indicates that at approximately 11:20 p.m. Kosobucki drove his wife and children home telling Wolske that he would meet him at the Aud-Mar Tavern and that at approximately midnight Wolske, who was operating his boat, and Kosobucki, who was operating his boat, went to the Aud-Mar Tavern to have one more drink. Kosobucki states that while at the Aud-Mar Tavern, Kosobucki met his sister-in-law's twin sister, the above mentioned Jane Reinholz, who then introduced Kosobucki to her friend, the above mentioned William Letto. Kosobucki states that after a couple of beers, the five, which now included Steve Oschmann, the bartender at the Aud-Mar, decided to go for a boat ride with Reinholz and Letto accompanying Kosobucki in his boat and Steve Oschmann riding in the boat operated by Wolske. Kosobucki states that at some

time around 1:15 a.m. they arrived at Rep's Dam Tavern on the south side of Big Muskego Lake where all had approximately three drinks apiece, that they then left the tavern again with Reinholz and Letto in Kosobucki's boat and Oschmann in Wolske's boat at approximately 2:00 a.m., procedded across Big Muskego Lake and back into Bass Bay. Kosobucki states that with he operating his boat and Wolske operating his boat, the two proceeded through a channel which connects Big Muskego Lake to Bass Bay, then allowed the two boats to float side by side with the occupants of both boats holding on to the other boat respectively. Kosobucki states they permitted the two boats to drift within fifty to a hundred yards of the southwest shore of Bass Bay at which point it was decided that they were getting too close to the shore and that they should move back to the middle of the lake. Kosobucki states that he and Wolske both started up their boats in order to move back to the middle of the Bay where they again planned to meet and drift across the lake. Kosobucki states he drove his boat to a spot approximately 200 yards directly out from the pier located in front of his residence on the northeast shore of the Bay at which time he then stopped his boat in front of the pier, stopped the motor on his boat, left it gear and while leaving the running lights and the interior lights and the radio on in the boat, he along with the above mentioned Reinholz and Letto then began to drift across the Bay. Kosobucki states that they were drifting for approximately four to five minutes before his boat was struck by the boat being operated by the defendant. Kosobucki states that he never saw Wolske's boat coming until the bow hit his boat at which time he observed both Reinholz and Letto to be struck by Wolske's boat as the stern of Wolske's boat struck Kosobucki in the side of the head throwing him to the rear of the boat. Kosobucki states he immediately got up and began to shake Letto and received no response. He then shook Reinholz and after short while heard a gurgling sound at which time he then started up the engine of his boat and immediately

raced the boat to the Aud-Mar beach, ran up to the tavern therein where he broke a window getting the attention of one Laurie Oschmann, who was inside, and called the police department.

The reports of Officer Moser further indicate that upon speaking to Kosobucki on the shore of the lake, Kosobucki identified a subject standing on shore near the Aud-Mar Building as the above named defendant, Fred Wolske. Moser indicates he then went over to the location where Wolske was standing at which point the defendant requested to make a phone call to a member of his family.

Counts 1, 2, 4 and 5 of the complaint are further based upon: Moser indicates that as the defendant spoke to him he noticed the defendant had a strong odor of intoxicants on his breath, that his eyes were bloodshot and that his speech was slurred and that upon proceeding with the defendant toward the Aud-Mar Tavern, he noticed that Wolske was weaving as he walked and also noticed that he lost his balance once he got to the phone booth. Moser indicates that upon Wolske completing his phone call he was asked to identify himself which he did, and was then asked by Moser if he was driving his boat, which was identified as an 18 foot Hydra Stream with a 200 h.p. Johnson outboard motor, to which the defendant responded that he was, then was asked by Moser if any other passengers were in the boat at the time to which the defendant responded that Steve Oschmann was with him. Moser indicates at this point he requested of the defendant to perform a field sobriety test and as they were walking outside the tavern to do same, he observed the defendant to lose his balance and had to side step to catch himself. Moser indicates that once outside the defendant refused to perform any tests, at which point he was placed under arrest and transported to the Muskego Police Department and subsequently to Waukesha Memorial Hospital where a blood sample was taken of the defendant utilizing a test kit prepared by the Wisconsin State Laboratory of Hygiene, Medical Toxicology Section. The reports indicate that the

sample of blood was drawn from the defendant by Carol Thomas, a Medical Technician, at the Waukesha Memorial Hospital, and subsequently transported to the Medical Toxicology Section of the State Laboratory of Hygiene at 464 Henry Mall in Madison, Wisconsin, where an analysis of the sample was performed by Noel V. Stanton, an Analyst with the Medical Toxicology Section and that the results of said test indicate that the defendant's bloof ethanol level was 0.224% by weight.

The reports next indicate speaking to the ordinary citizen, Steve Oschmann, who in this instance is believed to be truthful and reliable, and who, with respect to all counts, indicates he was a passenger on the boat being operated by the defendant, Fred Wolske, at the time it collided with the boat owned and operated by Mark Kosobucki during the early morning hours of May 26, 1986. Oschmann further indicates that he along with the defendant, Mark Kosobucki, Jane Reinholz, and Bill Letto, left Rep's Dam Tavern earlier that morning with Oschmann travelling in the boat operated by Wolske and Reinholz and Letto in the boat operated by Kosobucki and that they were travelling around the lake together. Oschmann states that at one point Wolske's boat ran out of gas so they had to stop and change gas tanks while the other boat continued on and that after changing the gas tanks he and the defendant proceeded across the lake with the defendant operating the boat at a speed of approximately 40 mph, when all of a sudden he observed Mark Kosobucki's boat to be sitting in front of them and before he could say "Fred," they had run over the other boat. Oschmann states that the next thing he heard was Mark Kosobucki screaming from the other boat and that he thereafter observed Kosobucki to drive his boat on to the shore. Oschmann states that he and Wolske then drove their boat to the pier at the Aud-Mar Tavern.

Counts 1 through 6 of the complaint are further based upon statements made by Francine M. Kosobucki, who in this instance is believed to be truthful and reliable, and

who advised officers that she is the wife of the above mentioned Mark Kosobucki. Francine Kosobucki indicates that on the night prior to the boating accident, that being Sunday, May 25, 1986, she and her husband had taken their two children in their boat at approximately 7:00 o'clock p.m. and drove across the lake in order to have dinner at their friends, Rich and Jan Reinke's house. Francine Kosobucki indicates they completed eating dinner at approximately 8:30 p.m. and that at approximately 11:30 p.m. she along with her husband and their two children got back into their boat and returned home at which point she and her husband put the two children to bed and then Mark Kosobucki left the house, got in his boat and drove off. Francine Kosobucki indicates that she went to bed a short time later. Francine Kosobucki further indicates that at approximately 3:00 a.m. she woke up and looked at the clock in her bedroom, that she then laid in the bed for approximately ten to fifteen minutes, at which time she got out of bed and walked outside the residence to see if she could find where her husband was. She indicates walking out toward Bass Bay where their pier was located, walked on to the pier and continued on same until she reached a point where she could see out to the lake. Francine indicates at this point she could see nothing, so she then turned around and began to walk back to her house when she heard some boats being operated out in Bass Bay just as she got off the pier. She indicates that she then walked back towards the Bay on the pier and when she got to the shore of Bass Bay she observed her husband's boat pulled up directly out from their pier, saw her husband's boat turn around, then heard the motor stop. Francine indicates that she could hear conversation ensuing on the boat and that she observed at that time that the lights were on Mark Kosobucki's boat both before and after the engine was turned off. Francine indicates that after the engine was turned off the boat remained stationary at which point she could then observe the boat which she recognized as the defendant, Fred Wolske's boat, being operated on the

south end of Bass Bay. She indicates that lights were on on this boat also and that the boat was doing "tail stands" in which the operator would gun the motor of the boat to force the front end of the boat out of the water. Francine indicates that she did not call out to her husband, but instead then turned around and began to walk back toward the house and when she was at the part of the pier that abutted the property, she heard a loud crash at which point she then turned around and ran all the way back out to the end of the pier and heard her husband yelling "wake up." Francine indicates she next observed her husband start up the engine of his boat and drive directly toward the Aud-Mar Tavern. Francine further indicates that she estimates it took three to five minutes from the time that her husband turned off the engine until she heard the crash.

Counts 1, 2 and 3 of the complaint are further based upon complainant's review of the reports of Waukesha County Deputy Medical Examiner Paul J. Konieck and Medical Examiner Dr. Helen Young which indicate that Konieck resonded to a request from the New Berlin Memorial Hospital during the early morning hours of May 26, 1986 and that upon arriving at the New Berlin Hospital at approximately 6:25 a.m. he spoke with Dr. Frisvold, who indicated he was the attending physician who had worked on the aforementioned William G. Letto. Frisvold further indicated that attempts to resuscitate Letto upon his arrival at the hospital during the early morning hours had been unsuccessful and he had been pronounced dead at 4:39 a.m. by Dr. Frisvold. Konieck indicates that the body was then transported to the Waukesha County Morgue where an autopsy was performed by Dr. Young. Dr. Young's reports indicate that while performing an autopsy of the aforementioned William G. Letto it was determined the decedent, William G. Letto, suffered from multiple fractures of the ribs on both sides of the chest cavity, fractures of his sternum and left elbow, that his heart suffered extensive lacerations, that his lungs were lacerated along with

his liver, spleen, left elbow, and right forehead, that there was evidence of extensive hemorrhaging in his lungs, liver, spleen and kidney, and that he suffered from a bilateral hemothorax and that the cause of death was due to multiple fractures and internal injuries suffered in a boating accident.

Counts 4, 5 and 6 of the complaint are based upon review of the medical reports of Dr. George Bartl, which are believed to be truthful and reliable in this instance which indicate that he was the attending physician for the aforementioned Jane S. Reinholz upon her arrival at New Berlin Memorial Hospital during the early morning hours of May 26, 1986. Dr. Bartl further indicates that upon examining and treating the aforementioned Reinhlz, he determined that she suffered from a cerebral concussion, multiple complex lacerations of her forehead, ears and jaw, and multiple tracheal soft tissue trauma. Bartl further indicates that Reinholz was suffering from a possible time of cerebral hypoxia. Dr. Bartl further indicates that the injuries included multiple contusions and abrasions, a three centimeter transverse laceration of the forehead, a puncture wound below the right ear, approximately one centimeter in depth, a three centimeter long laceration of the right pinna of the ear, that her airways were obstructed and that a series of alveolar ridge fractures had occurred to her jaw, that an endotracheal intubation was necessary to Reinholz because of her obstructed airways, that there was a complex laceration extending deeply along the right mandible along with a significant amount of facial swelling.

Based on the foregoing, the complainant believes this complaint to be true and correct.

Subscribed and sworn to before me this 14th day of July, 1986.

/s/ Donald J. Hassin, Jr.
Assistant District Attorney

/s/ James Budish
Complainant

APPROVED FOR FILING

/s/ Donald J. Hassin, Jr.
Assistant District Attorney

DJH/dz